Supreme Court, U.S.
FILED
DEC 4 - 2003
OFFICE OF THE CLERK

No. 03-661

In The Supreme Court of the United States

LINDA HOFFMANN-PUGH,

Petitioner,

v.

MARY T. KEENAN, as District Attorney for the Twentieth Judicial District of the State of Colorado,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM FRASER NAGEL*
Assistant District Attorney
ANDREW ROSS MACDONALD
Assistant County Attorney
P.O. Box 471
Boulder, CO 80306
(303) 441-3190
Attorneys for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii
I.	STATEMENT OF THE CASE	1
II.	REASONS TO DENY THE WRIT	1
	A. Introduction	1
	B. The Colorado Rules Protect Grand Jury Secrecy Without Violating a Witness' First Amendment Rights.	3
	C. The Tenth Circuit Decision Addresses an Issue of State Law in a Manner that Does Not Conflict With Other Appellate Decisions.	7
III.	CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Butterworth v. Smith, 494 U.S. 624 (1990) .....*passim*

Granbery v. Dist. Court, 531 P.2d 390 (Colo. 1975).....4, 9

People v. Rickard, 761 P.2d 188 (Colo. 1988).....4, 9

Seattle Times v. Rhinehart, 467 U.S. 20 (1984)..... 2

RULES

Colorado Rule of Criminal Procedure 6.2.....1, 3, 5

Colorado Rule of Criminal Procedure 6.3.....1, 3, 5

I. STATEMENT OF THE CASE

Linda Hoffmann-Pugh was a housekeeper for John and Patsy Ramsey prior to the highly publicized murder of their daughter, JonBenet Ramsey. She would like to write a book about her grand jury testimony, to discuss it with members of the media, and to answer questions about her grand jury testimony with interested members of the public. (Appendix B at 15a, ¶ 9) She claims that she has not done so out of fear of facing contempt proceedings for violation of the grand jury secrecy. (Appendix B at 16a, ¶ 10)

Rules 6.2 and 6.3 of the Colorado Rules of Criminal Procedure establish the obligation of secrecy for grand jury witnesses in Colorado. Ms. Hoffmann-Pugh sought a declaration that those rules violate her First Amendment rights. The trial court granted summary judgment in her favor, but on August 6, 2003, the Tenth Circuit reversed. It held that the Colorado grand jury rules that preserve the secrecy of witness testimony did not deprive Ms. Hoffmann-Pugh of her First Amendment rights. On October 7, 2003, the District Court entered an order and judgment in favor of the respondent in accordance with the Tenth Circuit opinion and mandate. On October 23, 2003, Ms. Hoffmann-Pugh filed her petition for a writ of certiorari. It was placed on the docket on November 4, 2003.

II. REASONS TO DENY THE WRIT

A. Introduction

The issue Petitioner presents is based on her expansive construction of state rules of criminal procedure on grand jury secrecy that conflicts with the authoritative

interpretation of those rules by the state supreme court. The Tenth Circuit opinion relies heavily on the Colorado Supreme Court's interpretation of Colorado rules. Moreover, that opinion merely reiterates the long honored rule that what happens behind the closed doors of the grand jury room is protected by secrecy. In addition, no circuit court or state high court cases conflict with the Tenth Circuit's decision on the merits. This Court should deny the petition because review would largely serve to address a discrete issue of Colorado law on a well-established legal principle.

Furthermore, the Tenth Circuit properly upheld the state rules. It construed the state rules based on Colorado Supreme Court decisions and properly concluded that grand jury secrecy in Colorado is limited to prohibiting disclosure of what occurred in the grand jury room. It also properly contrasted the effect of the Colorado rules with the effect of the Florida statute examined in *Butterworth v. Smith*, 494 U.S. 624 (1990). Finding the Colorado rules to be narrower than the Florida statute, the Court held that those rules are constitutional under *Butterworth,* particularly in light of this Court's discussion there of *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984).

This Court should not review the Tenth Circuit's decision because it does not involve an important federal issue and any further review will not have immediate importance beyond the particular facts, the parties involved, and the State of Colorado.

B. The Colorado Rules Protect Grand Jury Secrecy Without Violating a Witness' First Amendment Rights.

The Tenth Circuit determined that Colorado's grand jury rules do not operate to violate Ms. Hoffmann-Pugh's First Amendment right after properly examining them under Colorado and United States Supreme Court case law.

Colorado Rule of Criminal Procedure 6.2 states:

> All persons associated with a grand jury and its investigations or functions should at all times be aware that a grand jury is an investigative body, the proceedings of which shall be secret. Witnesses or persons under investigation should be dealt with privately to insure fairness. The oath of secrecy shall continue until such time as an indictment is made public, if an indictment is returned, or until a grand jury report dealing with the investigation is issued and made public as provided by law.

Colorado Rule of Criminal Procedure 6.3 states:

> The following oath shall be administered to each witness testifying before the grand jury:
>
> Do you swear (affirm), under penalty of perjury, that the testimony you are to give is the truth, the whole truth, and nothing but the truth, and that you will keep your testimony secret, except to discuss it with your attorney, or the prosecutor, until and unless an indictment or report is issued?

Ms. Hoffmann-Pugh claimed that these rules violate her First Amendment rights by requiring her, subject to

punishment through contempt, to keep her testimony secret when, as here, no indictment or report was issued and the grand jury ended its term. By "her testimony" she means her full experience from appearing before the grand jury, not the substance of what she knew prior to her grand jury appearance. As the Tenth Circuit explained:

> Ms. Hoffmann-Pugh apparently wishes to disclose more than information she possessed prior to her grand jury testimony. In her complaint, she refers to publishing a book that "will include her appearance before the Boulder grand jury . . . and recount her testimony." . . . She also refers to "questions addressed to her before the Boulder grand jury, and her answers." . . . She says she wants to relate publicly "her experience and testimony before the grand jury."

(Appendix A at 6a) By extending her desires beyond wanting to divulge the substance of her "testimony" to wanting to divulge her experience before the grand jury, Ms. Hoffmann-Pugh raised, and the Court of Appeals considered, issues beyond what was before this Court in *Butterworth*. *Butterworth*, 494 U.S. at 629, n.2.

In Colorado, "Grand jury secrecy is intended only to prevent disclosure of what transpires or will transpire before the grand jury." *People v. Rickard*, 761 P.2d 188, 192 (Colo. 1988). (Appendix A at 6a) Thus, "The policy of secrecy is intended only to protect against disclosure of what is said or takes place in the grand jury room. But if a document is sought for itself, independently, rather than because it was presented to the grand jury, there is no bar to disclosure." *Granbery v. Dist. Court*, 531 P.2d 390, 393-94 (Colo. 1975). Based on these state authorities, the Circuit Court concluded: "Thus, the Colorado statute does

not prohibit disclosure of information the witness already had independently of the grand jury process." (Appendix A at 5a-6a)

In *Butterworth*, the U.S. Supreme Court said, "We hold that insofar as the Florida law prohibits a grand jury witness from disclosing his own testimony after the term of the grand jury has ended, it violates the First Amendment to the United States Constitution." *Butterworth*, 494 U.S. at 626. This language only appears to be dispositive if this one sentence is viewed in isolation from the remainder of the opinion. This is because throughout the opinion this Court repeatedly made the critical distinction between (1) information the witness obtained on his own and brought to the grand jury proceeding and (2) information obtained as a result of his participation in the grand jury proceeding.

The Florida statute analyzed in *Butterworth* differs markedly from the much more limited Colorado rules. Colorado Rule of Criminal Procedure 6.2 provides that "the proceedings of" the grand jury "shall be secret." Colorado Rule of Criminal Procedure 6.3 requires grand jury witnesses to keep their "testimony" secret. In contrast, the Florida statute prohibited witnesses from disclosing their testimony and "the content, gist, or import thereof . . . ." *Butterworth*, 494 U.S. at 627.

This Court described the broad effect of the words "content, gist, or import" of the testimony in the Florida statute as "dramatic," explaining that:

> *before he is called to testify in front of the grand jury, respondent is possessed of information* on matters of admitted public concern about which he was free to speak at will. After giving his

> testimony, respondent believes he is no longer free to communicate *this information* since it relates to the "content, gist, or import" of his testimony.

Butterworth, 494 U.S. at 635 (emphasis added).

This Court also rejected Florida's reliance on *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). In doing so, the Court defined the issue presented by again distinguishing information possessed by the witness before he testified from information he obtained as a result of testifying. The Court described *Rhinehart* as upholding a protective order prohibiting a newspaper from publishing information it had obtained through discovery procedures in a civil suit, and then said:

> Here, by contrast, we deal only with respondent's right to divulge *information of which he was in possession before he testified before the grand jury*, and *not information which he may have obtained as a result of his participation in the proceedings of the grand jury*.

Butterworth, 494 U.S. at 631-32 (emphasis added).

Based on this reading of the Florida statute, the Court concluded that the First Amendment right violated by the Florida statute was the "right to make a truthful statement of *information he acquired on his own*." *Butterworth*, 494 U.S. at 636 (emphasis added).

In these ways, this Court limited the issue in *Butterworth*, and therefore limited its holding. The issue and the holding involved restrictions on disclosing the information the witness acquired on his own, prior to and independent of the grand jury proceeding, in contrast to information

obtained as a result of participation in secret grand jury proceedings.

The Tenth Circuit concluded that the Colorado grand jury rules contain no prohibition comparable to that found invalid in *Butterworth*. The Tenth Circuit properly examined this Court's analysis in *Butterworth* in light of the very different secrecy provisions involved there. The Court below found that the Colorado rules preclude a witness from describing what went on behind the closed doors of the grand jury room, nothing more. A witness in Colorado remains free to discuss information of which she was in possession before she testified before the grand jury. She may not, however, relay that information by describing it in relationship to the grand jury because she only learned of that context in the course of appearing before the grand jury. Therefore, the Colorado rules do not contain the constitutional infirmity present in *Butterworth*, but instead are narrowly designed to protect the grand jury process without unduly restricting either private speech or public discussion.

C. The Tenth Circuit Decision Addresses an Issue of State Law in a Manner that Does Not Conflict With Other Appellate Decisions.

This is the only published case since *Butterworth* that addresses the validity of grand jury secrecy rules concerning testimony of witnesses. As a result, no cases from other circuit courts or state high courts conflict with the Tenth Circuit decision. In addition, as this Court recognized in 1990, approximately 21 states and the federal government exempted witnesses from any grand jury secrecy obligation, and only fourteen states imposed some obligation of secrecy on grand jury witnesses. *See, Butterworth*, 494

U.S. at 635. Thus, a ruling by this Court would not implicate the federal grand jury system, would not be relevant to more than a handful of states, and would not resolve any conflicting decisions.

Hoffmann-Pugh presents the question she would like addressed to be the constitutionality of the Colorado rules under *Butterworth*. Nonetheless, she only provides a lengthy quotation from *Butterworth* (Petition at 16-18) and does not apply the analysis or the standard of review from that case to this one. Instead, much of the petition is a recitation of black letter language from First Amendment cases to make the argument that the Colorado rules do not meet "strict scrutiny" or that the word "testimony" in those rules is vague. (Petition at 5-16) She does so despite the fact that *Butterworth* involved neither strict scrutiny[1] nor vagueness.

Ms. Hoffmann-Pugh's argument boils down to her dispute with the Tenth Circuit's application of Colorado case law. In effect, she argues that the lower court was wrong to apply the state Supreme Court's construction of its own rules. For example, she describes the Colorado rules as effecting "a blanket prohibition." (Petition at 4, 5, 6) She explains what she means by this phrase by linking it to a restriction on disclosure of information "no matter how that information was obtained." (Petition at 5) She later states that her claim is that the Colorado rules "forbid a witness ever to discuss or use information that he

[1] Instead, this Court said, "We must thus balance respondent's asserted First Amendment rights against Florida's interests in preserving the confidentiality of its grand jury proceedings." *Butterworth*, 494 U.S. at 630.

himself developed and possessed before he was required to divulge it to the grand jury." (Petition at 6) Likewise, Hoffmann-Pugh's vagueness argument is premised on her claim that the Court of Appeals was wrong in concluding that the Colorado rules do not preclude a witness from disclosing the information she acquired on his or her own before entering the grand jury room. (Petition at 14-16) In these ways, she argues that the word "testimony" as used in the Colorado oath of secrecy must be construed as extending to information obtained outside the grand jury process.

As discussed above, however, the Colorado rules do not have the effect Hoffmann-Pugh attributes to them. The language of the Colorado rules limits secrecy to testimony and to the grand jury proceedings themselves. In addition, the Colorado Supreme Court has held that grand jury secrecy "is intended only to protect against disclosure of what is said or takes place in the grand jury room." *Granbery*, 531 P.2d at 393-94; *See, also, Rickard,* 761 P.2d at 192. The Tenth Circuit was correct to rely on the approach to Colorado grand jury secrecy of the state's high court, under which secrecy is limited to protecting the proceedings themselves.

This Court's review of the Colorado Supreme Court's interpretation of its own rules would serve no national interest. Hoffmann-Pugh does not present any compelling and important federal question to justify review by the United States Supreme Court.

III. CONCLUSION

It is therefore respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

WILLIAM FRASER NAGEL*
Assistant District Attorney
ANDREW ROSS MACDONALD
Assistant County Attorney
P.O. Box 471
Boulder, CO 80306
(303) 441-3190
Attorneys for Respondent

**Counsel of Record*